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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 571

ONA C. KEIPER, as Administratrix of the Estate of Ralph J. Keiper, Deceased,

Petitioner,

vs.

NORTHWESTERN PACIFIC RAILROAD COMPANY, a corporation,

Respondent.

Respondent's Brief in Opposition to Petition for Certiorari

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TABLE OF AUTHORITIES CITED

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Believing that there is no special or important or other reason for the review, by this Court, of the judgment below respondent, in opposition to the petition for certiorari and in support of its position, respectfully shows:

The facts are stated in the opinion of the California District Court of Appeal (App. B to Pet. p. 8ff). The statement by the Court is not questioned and is substantially repeated in the statement of the case in the petition. The short of the case is this:

The body of a man, employed by respondent railroad as a welder, was found early one morning upon the railroad track. The body was severed in two. It was obvious that it had been run over by at least one railroad train. This could have been the cause of death. There was no evidence that it was. There was nothing else in the case helpful to the plaintiff. If the evidence, offered in defense, was believed it showed that there was no negligence on respondent's part. If it were not believed, under the controlling decision in *Moore v. C. & O. Ry. Co.*, 340 US 573, such disbelief in no sense provided support for a finding to the contrary. The case is left as one of a dead man found alongside a railroad track. It is one selected by *Prosser, Torts,* 2ed., p. 199, as typical of cases where recovery can not be had. Prosser says:

> "It is often said that negligence must be proved, and never will be presumed. The mere fact that an accident or an injury has occurred, with nothing more, is not evidence of negligence. The fact that a man is found dead upon a railway track after a train has passed is no proof that the train was run without proper care."

The single question presented is whether the evidence warranted submission to the jury. Two California appellate courts have held that it did not, the District Court of Appeal for the Third Appellate District by its affirmative decision and the Supreme Court of California by denial of a petition for a hearing. What it was doing was stated by the District Court of Appeal as follows (App. to Pet. p. 14):

> "About all we can do is weigh the evidence appearing in the record and announce our opinion as to whether giving to it all the weight to which it is entitled the evidence is legally sufficient to support the jury's implied finding of negligence on the part of defendant."

The petition does not claim that the court below decided any federal question of substance not heretofore determined by this Court, or decided any question in a way probably not in accord with applicable decisions of this Court or any question of statutory construction or application. And it did not.

The petition argues that the Court below decided that the deceased was not an employee of respondent at the time he died and, by consequence, decided the case upon the ground that the Federal Employers' Liability Act did not apply. To this end the petition wrenches from its context the statement of the Court that there was not "a scintilla of evidence to indicate or support a finding that the decedent was engaged in any **act**[1] connected with his employment at the time he met his death." The argument is founded on a misconception of the decision of the court.

The Court below made it abundantly clear that it was deciding the case upon the basis of the existence of the employer-employee relationship and the application of the Federal Employers' Liability Act. The opinion summarized the provisions of the Act and then pointed out, with citation of appropriate supporting authority, that:

> "All questions of substance presented in actions under this statute are federal questions upon which the decisions of the federal courts are conclusive and binding upon all state courts."

It then determined that the evidence was insufficient to warrant submitting to the jury the question of negligence under the Federal Employers' Liability Act. Its statement that there was no evidence that the deceased "was engaged in any act connected with his employment" was used in con-

1. All emphasis by bold-face type is ours.

nection with whether the accident happened during his normal tour of duty and whether he was at work at the time and place of the accident, as this might bear upon whether his presence at that time and place reasonably could be anticipated (cf. *Jones,* 276 US 303). So in immediate sequence it is pointed out that upon petitioner's theory death did not occur before 10 p.m. (outside of the normal hours of work); that there was no suggestion in the evidence "that the deceased was welding or otherwise working at that time of the night, or that he was engaged in any activity of any nature on the tracks at that hour which could be considered as being even remotely connected with his employment." Again it pointed out that there is nothing which would support an inference that he was there for any purpose in connection with his employment; that there was no evidence "that he had any tools or equipment with him or even a light of any kind."

Far from being in conflict with any decision of this Court the case is controlled by *Kansas City etc. Co. v. Jones,* 276 US 303.[2] The accident happened in a train yard where it could be anticipated that men were at work. The deceased was a car inspector. His body was found between the main track and a parallel track. The probability was that he was killed by a train going north on the main track. A freight train was being made up on the parallel track. The theory was that he was engaged in inspecting the cars and so absorbed in his work that he did not see or hear the approaching train. There was evidence that its bell was not ringing. [There was no evidence that it whistled.] Dealing

2. The opinion is quite short. Only the controlling facts are stated. A more detailed statement of the facts appears in one of the opinions below reported in 282 S.W. 309 (Tex. Civ. App.). This is not the judgment under review. That came at a later stage (291 SW 528).

first with the suggestion, "the hypothesis" to use the language of the Court, that decedent was so absorbed in his work he was not aware of the approach of the train this Court disposed of the case as follows:

> "At best, it is a mere guess that he was so engaged, still more than he was absorbed in such work. The main track was straight and the train was making a great noise and showing a bright light as it approached. Nothing except imagination and sympathy warranted a finding that the death was due to negligence of the petitioner rather than to that of the man himself. It is unnecessary to consider whether, if the case for the plaintiff was stronger, the principle of *Chesapeake & Ohio R. Co. v. Nixon,* 271 US 218, 70 L ed 914, 46 Sup. Ct. Rep. 495, would apply."[3]

The brief statement of the facts in *Jones* is the statement of essential features making the case far stronger for the plaintiff than the case at bar.

It is respectfully submitted that the petition should be denied.

Dated at San Francisco, California, December 28, 1955

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3. The reference to *Nixon* is a reference to the doctrine of assumption of risk. Before the 1939 amendment of the Federal Employers' Liability Act assumption of risk was a defense. It was eliminated by the amendment of 1939 but *Jones* makes it abundantly clear that so far as its controlling authority is concerned the 1939 amendment is without significance because *Jones* went upon a ground making it "unnecessary to consider" the doctrine of assumption of risk.